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No. 84-1367

In The
Supreme Court of the United States
October Term, 1984

RAMIRO M. GUERRA, ET AL.,
Petitioners,

vs.

MARIA CARLOTA GARCIA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Respondents are prevailing parties and entitled to attorneys' fees in the absence of a determination on the merits.

2. Whether Petitioners' unilateral action in obtaining preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. Sec. 1973c and which effectively mooted the controversy after the issuance of a temporary restraining order against Petitioners, was required by law.

LIST OF PARTIES

1. Hidalgo County Judge Ramiro M. Guerra; Petitioner
2. County Commissioner Norberto Salinas; Petitioner
3. County Commissioner Charles Curtis; Petitioner
4. County Commissioner J.R. Ponce; Petitioner
5. County Commissioner Ramiro Cavazos; Petitioner
6. Hidalgo County, Texas; Petitioner
7. Maria Carlota Garcia, individually and on behalf of all others similarly situated; Respondent
8. Juana de la Cruz, individually and on behalf of all others similarly situated; Respondent
9. Paulino Ramirez, individually and on behalf of all others similarly situated; Respondent
10. Jesus M. Hernandez, individually and on behalf of all others similarly situated; Respondent
11. Maria Hernandez, individually and on behalf of all others similarly situated; Respondent
12. Irene Sustayta, individually and on behalf of all others similarly situated; Respondent
13. Eloisa Leal, individually and on behalf of all others similarly situated; Respondent

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Respondents respectfully submit this their Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

CITATION TO OPINIONS BELOW

Petitioners' citation of the opinions below in their Petition for Writ of Certiorari is correct. Petitioners have failed to note however, that on November 21, 1984, the appellate court filed a two sentence order which states as follows:

> It is ordered that appellants' motion to amend this Court's opinion and judgment is DENIED. The opinion and judgment contain no limitation upon the attorney's fees to which appellant rightfully is entitled.

JURISDICTION

Petitioners accurately state their allegations of jurisdiction in their Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

Petitioners accurately state the statutory provisions involved in their Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Petitioner's Statement of the Case as well as their brief in general contains incomplete interpretations of Texas election statutes and totally omits any mention of the outrageous fact situation which led to the filing of this lawsuit.

This lawsuit comes out of deep south Texas in the Rio Grande Valley which is the setting of many years of traditional rivalry between Anglo agribusiness and Mexican-American farmworkers. The early history of this area is peppered with land fraud, farmworker exploitation, brutality on the part of farmworker overseers or the Texas Rangers, segregated schools with schedules set up to allow Mexican-American children to pick crops, low wages, union busting, strikes, political exclusion of Mexican-Americans, rigged elections, and the "patron" system which is akin to feudalism. *Allee v. Medrano*, 347 F. Supp. 605, aff'd 416 U.S. 802, 807, 94 S.Ct. 2191 (1974) paints a more recent picture of the conditions and brutality against farmworkers in Hidalgo and neighboring Cameron County.

Progreso Independent School District (hereinafter PROGRESO) located in Hidalgo County, is a small rural school district which has approximately 900 students enrolled in its one elementary school. Approximately 95 to 98 per cent of the population and enrollment and about 80 per cent of the registered voters in the school district are Mexican-American. Approximately 226 students are migrant farmworker children who migrate north to harvest the crops with their parents in late May returning in mid September on a yearly basis. There are approximately 70 to 170 migrant registered voters who live within PROGRESO who are gone during the migrations.

The 3736 people who reside in PROGRESO have struggled over the years in attempting to provide a good education for their children. The voters of PROGRESO passed a 1.9 million dollar bond issue in an unsubmitted and unprecleared January, 1981 election in which *51 votes* decided the outcome. The money will be used to build the

district's first high school which will be staffed, designed, and operated with the problems of the migrant children in mind. The ranch owners and other landowners within PROGRESO are completely opposed to the issuance of the bonds because they will shoulder the greatest burden of paying for the high school through payment of the *ad valorem* property tax since they own most of the land. Additionally, the ranchers have generally refused to send their children to PROGRESO preferring instead to send their children to neighboring Weslaco Independent School District (hereinafter WESLACO) where their children would not be in the 4 per cent minority as they would be if they attended PROGRESO.

Efforts to defeat the bond election continued when the ranchers and their friends filed an action in the state courts seeking to declare the bond election illegal; they lost at the state trial level. They continued with the appellate process where, in all probability, they will lose as well. In a last-ditch effort to avoid the official issuance and sale of the bonds which has been held up until the state appellate process is over, the ranchers attempted to have Hidalgo County hold a consolidation election in hopes that PROGRESO and WESLACO voters would approve a consolidation of both school districts. In reality, this would be similar to an annexation since WESLACO is about 15 times bigger in student enrollment and population than PROGRESO. The effects and reasons that Plaintiffs-Respondents were opposed to the attempted consolidation were that: (a) PROGRESO would cease to exist as a political jurisdiction and all PROGRESO trustees would lose the positions to which they were elected; (b) 5 Anglo and 3 Mexican-American WESLACO trus-

tees would replace the 1 Anglo and 6 Mexican-American PROGRESO trustees; (c) voters would no longer elect trustees under an at-large plurality system as used in PROGRESO but would instead elect trustees pursuant to an at-large-by-place system as used in WESLACO which would significantly increase the probability that PROGRESO voters would lose their representation; (d) the demographics of the consolidated school district would lead to a retrogression of Mexican-American voting strength in PROGRESO; (e) the bonds passed pursuant to the bond election could not be issued; and (f) the high school in all probability would never be built. Such a consolidation would have had a highly discriminatory effect against Mexican-American migrant farmworkers in particular and Mexican-Americans in general.

Other than the one unprecleared bond election in January of 1981, and the election to incorporate PROGRESO in September of 1928, PROGRESO had never held elections at any other time of the year; their routine practice was to hold regular elections on the first Saturday of April.

The education statutes dealing with consolidation provide that if 20 registered voters of each school district wishing a consolidation file a petition with the County Judge, the County Judge must order a consolidation election so that the consolidation can be approved by a majority of the voters in each school district.

Pursuant to TEX. ED. CODE ANN. Sec.19.232 (1972), (Appendix H of Petition for Writ of Certiorari), the ranchers and their friends in each school district filed the first such petition on August 24, 1981. The County

Judge then ordered an election for January 16, 1982. Apparently realizing that they had passed up the opportunity to disenfranchise the migrant farmworker voters, the ranchers withdrew their first petition with a Petition to Withdraw. The consolidation election was called off. The ranchers then waited for all the migrant registered voters to leave on their yearly migration and on July 6, 1982 the ranchers filed another petition requesting a consolidation election for August 14, 1982. This is the second Saturday in August and is one of the four uniform election dates in the State of Texas provided by TEX. ELECT. CODE ANN. Art. 2.01b (Appendix G of Petitioners' Brief, hereinafter 2.01b). Out of approximately sixty to seventy signatures found on all the petitions, nine are found on all three petitions. These nine people include, among others, one school board member of each of the school districts and one previous mayor of a tiny village within PROGRESO. Though the petition has the requisite number of signatures, it is clear and almost common knowledge that these nine people masterminded the whole scheme. Respondents remain convinced that the petitions for consolidation were filed, withdrawn, and refiled with the intent of disenfranchising Mexican-American migrant farmworkers so as to give the supporters of the consolidation the winning edge at election time.

The County Judge attempted to act pursuant to TEX. ED. CODE ANN. Section 19.233 (Appendix H of Petitioners Brief) and Article 2.01b which have been precleared. Unfortunately, and counter to Petitioners' interpretation of Texas election law, the county Judge did not comply with subsection (e) of Art. 2.01b which requires that the election be called for the next election date which

"allows sufficient time to comply with other requirements of law" such as Section 5 of the Voting Rights Act. On the other hand, the ranchers and their friends acted pursuant to Section 19.232 which has never been submitted for preclearance since Section 19.232 has not been amended after November 1, 1972. Plaintiffs never alleged that the County Judge had acted with a discriminatory intent, however, every official in South Texas knows about the yearly migrations of the migrants and his disregard for the need for preclearance is at best a callous disregard for their voting rights. Other than now alleging that the county did not have to submit the new election date for preclearance, it is not clear why he did not submit the change as soon as he knew that he would be required to order the election. It is perfectly clear however, that the masterminds of the above described scheme had indeed acted precisely with a discriminatory intent in mind. They used state statutes that are neutral on their face in an attempt to discriminatorily disenfranchise Mexican-American migrant farmworkers by taking advantage of their absence during the yearly migrations.

Upon learning all these facts, the trial court correctly issued a temporary restraining order prohibiting the election in August of 1982. The Petitioners then reluctantly agreed to submit for and obtain preclearance before a three judge panel could be convened. After preclearance had been granted for the election at its normal time in April and after the consolidation was defeated, Respondents then filed their motion for attorneys' fees which was denied by the trial court. It is the denial of attorneys' fees by the trial court for which Respondents appealed

to the Fifth Circuit Court of Appeals and it is that court's reversal which brings the case before this court.

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SUMMARY OF ARGUMENT

The change from one precleared routine election date to another precleared unroutine election date is itself a change requiring preclearance. Since (1) the change is one which requires preclearance by law, (2) the Petitioners acted unilaterally to obtain preclearance and mooted the lawsuit after the temporary restraining order was issued, and (3) the temporary restraining order and unilateral action in obtaining preclearance was caused by the lawsuit. Respondents are the prevailing parties entitled to attorneys' fees.

———o———

ARGUMENT FOR DENYING THE WRIT

A. The Decision Below Comports With Decisions Of The United States Supreme Court And With Well Established Voting Rights Law.

A recent Supreme Court decision concerning the applicability of the preclearance section of the Voting Rights Act quotes Department of Justice regulations which state:

> Any change affecting voting, even though it appears to be minor or indirect, even though it ostensibly expands voting rights, or even though it is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirement.

28 CFR Section 51.11 (1984) cited in *National Association for the Advancement of Colored People et al v. Hampton County Election Commission et al,* —U.S.—, 53 U.S.L.W. 4207, 4210 (1985).

Not only does recent as well as established caselaw clearly emphasize the need for preclearance, the preclearance documents in this case instructed these jurisdictions to obtain preclearance for these kinds of changes. Although it is true that blanket preclearance had been obtianed for all Texas political subdivisions for the four election dates, the Department of Justice in their December 16, 1975 letter to John F. Pettit, General Counsel, Office of the Secretary of State, State of Texas (Appendix J, Petitioners' Brief, pp. A42-A43) states:

> In reference to your request that your submission be considered a blanket submission for all political subdivisions in Texas, the submission is considered a blanket submission for those changes which are mandated by H.B. 275. Where H.B. 275 merely authorizes political subdivisions to make changes, i.e., Section 1c (where the governing body of political subdivisions whose elections fall in October or November may choose any of the four (4) dates) and Section 2, the changes would fall under Section 5 of the Voting Rights Act separately as the changes occur.

Furthermore, in a letter from the Department of Justice to the Honorable Mark White, Secretary of State, State of Texas, dated August 22, 1977, (Appendix O, Petitioners Brief, p. A70) the Department of Justice reminds the Secretary that:

> any changes in election date made pursuant to House Bill 443 (1977) are subject to the preclearance requirements of Section 5.

The assertion of the Petitioners that blanket approval had been obtained from the Attorney General for all four election dates, though true, completely misses the point of law involved and displays a misunderstanding and misinterpretation of the requirements of Section 5 of the Voting Rights Act.

In other words, the preclearance documents for H.B. 275 and H.B. 443, codified as TEX. ELECT. CODE ANN. Art. 2.01b, both indicate that even though the four election dates were precleared, the different local Texas jurisdictions still have to submit for preclearance changes from one precleared date to another precleared date "as the changes occur". It is simply ludicrous for Petitioners to continue to contend that preclearance was not required but it is the only argument they have left to avoid paying attorneys' fees.

B. The Decision Below Does Not Raise Any Significant Or Recurring Problems Regarding The Award Of Attorneys' Fees.

In ruling for Appellant-Respondents in this case, the Court of Appeals for the Fifth Circuit has repeated the well settled rule of law that a party may be considered to have prevailed when remedial action by the other party effectively moots the controversy. *Commissioners' Court of Medina County v. United States,* 683 F.2d 435 (D.C.Cir. 1982); *Iranian Students Association v. Sawyer,* 639 F.2d 1160 (5th Cir. 1981); *Doe v. Marshall,* 622 F.2d 118 (5th Cir. 1980). Most recently, *Hennigan v. Ouachita Parish School Board,* No. 84-4157 (5th Cir. 1985) cites well settled law and follows the line of cases that hold that in the absence of a determination on the merits, a plaintiff may

still recover attorneys fees when plaintiffs can show a causal connection between the filing of the suit and the Defendants' remedial action and that the defendant's conduct was required by law, i.e. was not a wholly gratuitous response to an action that in itself was frivolous or groundless. *Williams v. Leatherbury,* 672 F.2d 549, 551 (5th Cir. 1982). Nothing else is at issue on this appeal.

The facts of this case are clear and fit within those rules. It is only Petitioners' insistence on distorting clear law in an attempt to avoid paying attorneys' fees which has made this case unnecessarily complicated. Further arguments to the contrary to these well settled rules on the part of Petitioners are useless, are not made from any reasonable legal analysis, are a waste of taxpayers' money which is being used to defend these spurious arguments, and are interjected solely for the purpose of delaying the rightful payment of attorneys' fees to Respondents' attorneys.

C. The Decision Below Essentially Establishes That There Are No Special Circumstances.

As noted earlier in the Citations to Opinions Below, supra, p.2, the Appellate Court filed an order on November 24, 1984 indicating that its judgment in this case contains no limitation upon the attorneys' fees to which Appellant-Respondents are rightfully entitled.

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CONCLUSION

The Petition for Writ of Certiorari should be denied because the decision below does not conflict with decisions of the United States Supreme Court and indeed follows squarely in line with the most recent opinion of this court regarding the Voting Rights Act, correctly applies well established caselaw for the determination of entitlement of attorneys fees in cases such as this, and correctly remands the case for a determination of the appropriate attorney's fee award which is wholly justified.

Respectfully submitted,

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